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No. 08-365

In the Supreme Court of the United States

HAKAN OZCELIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for seeking and accepting a bribe in violation of 18 U.S.C. 201(b)(2), where petitioner, a Customs and Border Protection Officer, accepted $2300 from a confidential informant and indicated that, in exchange for that money, petitioner's contacts in the federal immigration agency would alter the informant's visa status in official computer records.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Ogden v. *United States*, 303 F.2d 724 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964) 9

Opper v. *United States*, 348 U.S. 84 (1954) 7, 8, 9, 10

Smith v. *United States*, 348 U.S. 147 (1954) 8, 10

United States v. *Ford*, 435 F.3d 204 (2d Cir. 2006) 12

United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983) 12

United States v. *Simmons*, 923 F.2d 934 (2d Cir.), cert. denied, 500 U.S. 919, and 502 U.S. 943 (1991) 9

United States v. *Valle*, 538 F.3d 341 (5th Cir. 2008), petition for cert. pending, No. 08-7441 (filed Nov. 24, 2008) 11

United States v. *Waldemer*, 50 F.3d 1379 (7th Cir.), cert. denied, 515 U.S. 1151 (1995) 9

United States v. *Williams*, 504 U.S. 36 (1992) 8

Warszower v. *United States*, 312 U.S. 342 (1941) 9

Wong Sun v. *United States*, 371 U.S. 471 (1963) 7, 8

Statutes:

8 U.S.C. 1324(a)(1)(A)(iii) 2, 5

18 U.S.C. 2 ..... 2, 5

Statutes—Continued: Page

18 U.S.C. 201 5
18 U.S.C. 201(b)(2) 2, 5, 11, 12
18 U.S.C. 201(b)(2)(C) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 527 F.3d 88. The opinion of the district court (Pet. App. 29-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2008. A petition for rehearing was denied on June 23, 2008 (Pet. App. 39). The petition for a writ of certiorari was filed on September 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of seeking and accepting a bribe in return for being influenced in the performance of official acts or for

being induced to do acts in violation of official duties, in violation of 18 U.S.C. 201(b)(2) and 2 (Count 1); and attempting to conceal, harbor, and shield an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) (Count 2). Pet. App. 5-6, 29. The district court sentenced petitioner to concurrent terms of 27 months of imprisonment on each count. *Id.* at 7. The court of appeals affirmed petitioner's conviction on Count 1, but reversed his conviction on Count 2 for insufficient evidence and remanded for resentencing. *Id.* at 1-28. On remand, the district court resentenced petitioner to a term of 23 months of imprisonment on Count 1. Pet. 6.

1. a. Tunc Tuncer was a Turkish citizen who had been admitted into the United States on a student visa to attend Columbia University. Tuncer failed to meet academic standards at Columbia, and the school refused to readmit him. Tuncer therefore became subject to removal for being "out of status." Pet. App. 3; Gov't C.A. Br. 3

In October 2004, Tuncer's friend Uzgar Madik put Tuncer in contact with petitioner for help with his immigration issue. At the time, petitioner was a Customs and Border Protection Officer in the Department of Homeland Security (DHS). Pet. App. 3. Petitioner's primary duty was to inspect cargo on cruise vessels in Port Elizabeth, New Jersey, but petitioner also occasionally inspected the immigration documents of passengers at Newark International Airport. *Ibid.*; Gov't C.A. Br. 2-3.

After a short initial conversation, petitioner called Tuncer back to report that his case was "doable" or "easy" but that Tuncer would have to pay petitioner $2300. Gov't C.A. Br. 4; Pet. App. 3. Petitioner told Tuncer the money was for two of petitioner's friends in the Immigration and Naturalization Service (INS), who

would change the dates on Tuncer's visa in the official records system. *Id.* at 3-4. Petitioner told Tuncer he had "done this" for another person recently, and Tuncer told petitioner he would call when he obtained the money. *Id.* at 4. Petitioner called Tuncer several times over the next week or two to inquire about the money. Months then passed without Tuncer obtaining the money for petitioner. *Ibid.*; Gov't C.A. Br. 5.

b. In March 2005, an Immigration and Customs Enforcement (ICE) agent visited Tuncer at his apartment and advised him that he was "out of status." Pet. App. 4; Gov't C.A. Br. 5-6. The next day, the ICE agent administratively arrested Tuncer. *Ibid.* At that time, the agent and Tuncer discussed the possibility of Tuncer providing information to ICE about petitioner. *Ibid.*

Between March and May of 2005, Tuncer initiated several telephone conversations with petitioner at the direction of law enforcement, who recorded the conversations. Pet. App. 4; Gov't C.A. Br. 6-8. In the conversations, Tuncer informed petitioner that the immigration problem he previously had discussed was continuing, and petitioner reiterated to Tuncer that he could help but that Tuncer would have to pay at least $2000. *Ibid.* Petitioner subsequently amended the price to $2300, explaining that "[t]here is 2000 and than [sic] there is 300 for the fee, they will give those, they will do the thing for you, they will do the thing from the inside." Pet. App. 5 (brackets in original). Petitioner told Tuncer that his friends at INS would "deliver" a "one year extension of the I-20 [form]" to his home address and warned Tuncer that he should not tell anyone what was being done. Gov't C.A. Br. 8 (brackets in original). Petitioner did not tell Tuncer the name of his two contacts in

the INS, but he repeatedly stated that the money was for them. Pet. App. 5.

Petitioner and Tuncer arranged to meet at a shopping mall on March 24, 2005, so that Tuncer could pay petitioner the $2300 fee and provide him with copies of his immigration paperwork. Pet. App. 5. ICE agents gave the money to Tuncer and monitored the meeting with audio and video equipment. Gov't C.A. Br. 8-9. Petitioner arrived at the meeting wearing his official uniform and badge. *Id.* at 9. During the meeting, Tuncer inquired about whether petitioner's contacts were employees of INS. Petitioner responded that he could not "tell [Tuncer] that" and that Tuncer was "going too deep now." *Ibid.* Petitioner reassured Tuncer that something would be done "in the system," told Tuncer the process would take at least three months, and warned Tuncer again not to talk to others about the plan. *Id.* at 9-10. Petitioner directed Tuncer to get into petitioner's car and then instructed Tuncer to leave the money and his immigration documents in the space between the seats. Tuncer complied. *Id.* at 11.

Two months later, on May 24, 2005, petitioner and Tuncer had a final telephone conversation in which Tuncer asked if there was "anything new." Petitioner told Tuncer that he had made the necessary contacts and that Tuncer would be the one "receiving the news." Pet. App. 5; Gov't C.A. Br. 11-12.

c. Petitioner was arrested on September 13, 2005. In a post-arrest interview, petitioner denied that he was at the shopping mall on March 24, 2005, and denied meeting anyone at the mall to collect documents or money. Gov't C.A. Br. 12.

2. A grand jury in the District of New Jersey returned a two-count indictment charging petitioner

with seeking and accepting a bribe, in violation of 18 U.S.C. 201(b)(2) and 2, and attempting to conceal, harbor, and shield an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Pet. App. 5. The jury convicted petitioner of both counts, and the district court denied petitioner's motions for judgment of acquittal. *Id.* at 6, 29-38.

3. On appeal, petitioner challenged, *inter alia*, the sufficiency of the evidence supporting his convictions. The court of appeals reversed petitioner's conviction under 8 U.S.C. 1324(a)(1)(A)(iii) but affirmed petitioner's conviction under the bribery statute. Pet. App. 1-28.

a. The bribery statute, 18 U.S.C. 201, provides in pertinent part that it is a crime for

> a public official, directly or indirectly, [to] corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person.

18 U.S.C. 201(b)(2).

b. As relevant here, the court of appeals found that there was "no question" that the evidence at trial satisfied the first two elements of the offense of bribery,

namely, that petitioner was a public official and that he received something of value. Pet. App. 9-10. The only "disputed issue," the court explained, was "whether the evidence [was] sufficient to prove that [petitioner] received Tuncer's money with a corrupt intent, that is, * * * for one of the three reasons prohibited by [the] statute." *Id.* at 10.

The court concluded that "the jury could find that [petitioner] asked other individuals within DHS to take official action on behalf of Tuncer," which was consistent with a "theory of aiding and abetting other unidentified Immigration officials to take official action to alter Tuncer's records." Pet. App. 11. The court also observed that the only "piece of evidence to show that such Immigration officials even existed" were petitioner's statements to Tuncer about his "friends" in the INS who would undertake to alter Tuncer's visa status. *Ibid.*

The court explained that in order to convict petitioner of bribery on an aiding-and-abetting theory, the government was required to prove that the "principals" (in this case, the two INS employees) committed all the elements of the charged offense. Pet. App. 12. For bribery, that showing required proof that the INS officials "agree[d] to accept the bribe in exchange for promising to carry out one of the statutory prohibitions (i.e., the promise to alter Tuncer's visa)." *Ibid.* The court concluded that the jury "could reasonably have concluded that [petitioner] had a contact (or contacts) at INS whom he aided in taking a bribe to violate the contact's official duty." *Id.* at 14. The court explained that the jury had evidence, in the form of petitioner's own statements to Tuncer, showing that petitioner's INS contacts had *agreed* to adjust Tuncer's visa status in exchange for the bribe money, "and it was at that point [(*i.e.*, the

moment of agreement)] that the crime of the principal was complete." *Ibid.*

The court of appeals acknowledged that it was "possible," as petitioner claimed on appeal, that petitioner "was lying" to Tuncer and that he had "no 'friend' at the INS" who was willing to adjust Tuncer's status. Pet. App. 15. But the court rejected the suggestion that such a possibility required reversal of petitioner's bribery conviction, because the credibility of petitioner's assertions was a matter for the jury to consider. *Ibid.* The court "[could not] say as a matter of law that no reasonable juror could accept the government's theory premised upon [petitioner's] own statements," and the court emphasized that it was "not permitted to assess credibility" in evaluating on appeal whether the evidence was sufficient to support petitioner's conviction. *Ibid.*

ARGUMENT

Petitioner asks the Court to grant review to address the question "whether a conviction premised on aiding and abetting can stand where there was no evidence—aside from the defendant's own statements—that any principal had committed a crime, or even existed." Pet. 7. Further review of that narrow issue is not warranted. The court of appeals did not err in finding that the evidence was sufficient to support petitioner's conviction for bribery, and the court's decision does not conflict with any decision of this Court or of another court of appeals.

1. Petitioner relies on *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and *Opper* v. *United States*, 348 U.S. 84 (1954), as principal authorities for his position that petitioner's statements to Tuncer, even if credited by the jury as truthful, were insufficient as a matter of

law to establish that a crime was committed by the "principals" in this case, *i.e.*, the INS officials to whom petitioner claimed to have given the bribe money. *Wong Sun* and *Opper* state the "general rule that an accused may not be convicted on his own uncorroborated confession." *Smith* v. *United States*, 348 U.S. 147, 152 (1954); see *Wong Sun*, 371 U.S. at 488-489; *Opper*, 348 U.S. at 89-90. Petitioner acknowledges (Pet. 13) that *Wong Sun* and *Opper* did not involve aiding-and-abetting liability. Petitioner asks the Court to extend the reasoning of those cases to the aiding-and-abetting context.

As an initial matter, although petitioner challenged the sufficiency of the evidence supporting his bribery conviction in the court of appeals (Pet. C.A. Br. 29-31, 35-48) and included an argument that the evidence failed to establish aiding-and-abetting liability (*id.* at 41-45), petitioner did not rely upon *Wong Sun* and *Opper* in the appellate court. The court of appeals also did not address the distinct corroboration rule articulated in those cases. Pet. App. 8-19. Accordingly, petitioner's claim is not properly before this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (The Court's "traditional rule" precludes a grant of a writ of certiorari when the question presented was not pressed or passed upon below.).

Petitioner's arguments also are without merit because they misperceive the scope of the corroboration rule articulated in *Wong Sun* and *Opper*. Unlike this case, *Wong Sun* and *Opper* both involved confessions or admissions of defendants that were made "after the fact"—that is, after the commission of the crime at issue. *Wong Sun*, 371 U.S. at 488-491; *Opper*, 348 U.S. at 88-89. As the Court explained in *Opper*, the rationale for requiring corroboration in the context of post-crime

confessions and admissions is that "the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Id.* at 89-90.

Those concerns are not present in the context of statements made by an accused before a crime has occurred or, as in this case, when the crime is ongoing, the accused is not "under the strain of suspicion," and the statements of the accused are made in furtherance of the crime itself. See *Warszower* v. *United States*, 312 U.S. 342, 347 (1941) (admissions made "prior to the crime" do not require corroboration because they "contain none of the inherent weaknesses of confessions or admissions after the fact"); *Ogden* v. *United States*, 303 F.2d 724, 742 (9th Cir. 1962) (rule requiring corroboration of a defendant's admissions "applies only to admissions made after the commission of the offense"), cert. denied, 376 U.S. 973 (1964). The courts of appeals have recognized this limitation on the corroboration rule. See, *e.g.*, *United States* v. *Simmons*, 923 F.2d 934, 954 (2d Cir.) (noting the "critical distinction" between statements made to law enforcement officers after commission of a crime and statements made between co-conspirators in furtherance of a conspiracy), cert. denied, 500 U.S. 919, and 502 U.S. 943 (1991); *United States* v. *Waldemer*, 50 F.3d 1379, 1388 (7th Cir.) ("Statements that a defendant made before or during the commission of the crime do not have to be corroborated to convict the defendant."), cert. denied, 515 U.S. 1151 (1995). Accordingly, the court of appeals did not err in concluding that the credibility of petitioner's assertions to Tuncer was a matter for the jury to resolve and that, if credited, those asser-

tions supported a jury finding that petitioner's INS "friends" had committed the offense of bribery.

2. Further review also is unwarranted because, even assuming a "corroboration rule" applied to petitioner's out-of-court statements to Tuncer, the record contained adequate corroborating evidence of the crime. In *Opper*, the Court explained that "[i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." 348 U.S. at 93. The corroborating evidence "does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that [the] defendant is guilty." *Smith*, 348 U.S. at 156.

In this case, petitioner's assertions to Tuncer about the illicit conduct of his contacts in the INS were corroborated, first, by the direct evidence that petitioner accepted Tuncer's $2300 bribe payment. The manner in which petitioner accepted the money— secretly, in his car, by directing Tuncer to leave it between the seats— strengthened the corroboration by exhibiting petitioner's consciousness of his own guilt. Similarly, petitioner's repeated instructions to Tuncer to conceal their arrangement provided additional corroboration that the bribery offense was actually occurring as petitioner said it was. And petitioner's post-arrest false exculpatory statements—denying that he was ever at the shopping mall to engage in an exchange with Tuncer when his presence there was indisputable—provided further corroboration for the bribery offense.

3. This case also would be a poor vehicle in which to address the issue petitioner presents. Although the court of appeals concluded that only an aiding-and-abet-

ting theory could support petitioner's conviction for bribery, that is not correct. See Pet. App. 11 (noting that both theories of petitioner's guilt articulated by the government "blend[ed] together into one theory of aiding and abetting" immigration officials to take official action on Tuncer's records). As the government argued, Gov't C.A. Br. 39-41, petitioner violated the bribery statute by accepting Tuncer's money in return for being induced to act in violation of his *own* official duty under 18 U.S.C. 201(b)(2)(C). Petitioner violated his official duty as a DHS officer when he agreed to facilitate Tuncer's efforts to alter his immigration status through illicit means. Because petitioner accepted cash as an inducement to engage in that violation of duty, he committed bribery, and his liability did not depend on aiding-and-abetting principles.

Moreover, petitioner's liability on a "violation of [ ] official duty" theory, see 18 U.S.C. 201(b)(2)(C), does not require the existence of "real" INS agents who were capable of fulfilling the promises petitioner made to Tuncer. The bribery statute does not require that the public official genuinely intend to commit the violation of his official duty when he corruptly seeks or receives something of value; rather, it is sufficient if the public official corruptly receives the payment knowing that it is being given for the purpose of inducing him to violate his duty. See *United States* v. *Valle*, 538 F.3d 341, 344-347 (5th Cir. 2008), petition for cert. pending, No. 08-7441 (filed Nov. 24, 2008). In other words, it is no defense to Section 201(b)(2) liability that the public official fraudulently promised the bribe-giver that he would violate his duty. As the Second Circuit has explained, "[i]f [the defendant] was 'playacting' and giving false promises of assistance to people he believed were offer-

ing him money to influence his official actions, he violated [Section 201(b)(2)]." *United States* v. *Myers*, 692 F.2d 823, 842 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983); see also *United States* v. *Ford*, 435 F.3d 204, 213 n.6 (2d Cir. 2006). Accordingly, petitioner's receipt of Tuncer's payment in return for his corrupt promise to have others illicitly adjust Tuncer's visa status violated Section 201(b)(2), even if petitioner's purported contacts in the INS did not exist. Petitioner was a "public official;" he sought and received money; the payment was made to induce him to violate his official duty; and he accepted Tuncer's money with corrupt intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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